Onyx Environmental Services, L.L.C., d/b/a Tradewaste Incineration *and* International Chemical Workers Union Council/UFCW, AFL–CIO, CLC. Cases 14–CA–25788 and 14–RC–12080

October 23, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On August 3, 2000, Administrative Law Judge C. Richard Miserendino issued the attached decision.[1] The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.[4]

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Coercively interrogating employees about their protected concerted activity.

(b) Interfering with employees' protected concerted activity by telling them that a notice regarding another employee's wage rate was inappropriate, harassing, and disruptive.

(c) Predicting that it would lose its parent company's financial support and loss of customers if the employees elected the Union to represent them.

4. The Respondent violated Section 8(a)(1) of the Act by suspending employee Nathan Williams from October 8–22, 1999, for engaging in protected concerted activity.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The conduct described in paragraphs 3(a)–(c) and 4 above, also constitute objectionable conduct affecting the results of the representation election held in Case 14–RC–12080 on October 21 and 22, 1999.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Onyx Environmental Services, L.L.C., d/b/a Tradewaste Incineration, Sauget, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees for engaging in protected concerted activity.

(b) Interfering with employees' protected concerted activity by telling employees that a notice regarding another employee's wage rate was inappropriate, harassing, and disruptive.

(c) Predicting that it would lose its parent company's financial support and loss of customers if the employees elected the Union to represent them.

(d) Suspending employees for engaging in protected concerted activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Nathan Williams whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Sauget, Illinois, copies of the attached no-

[1] On August 10, 2000, the judge issued an errata to his decision.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II,6, par. 2, the judge incorrectly referred to "Section 8(a)(3)" instead of "Section (a)(1)."

[3] We have modified the judge's conclusions of law, the recommended Order, and the notice to employees to more accurately reflect that the Respondent's violations involved Sec. 8(a)(1) of the Act rather than Sec. 8(a)(3); thus, the words "union and" are deleted from the phrase "union and protected concerted activity" used by the judge.

[4] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

tice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 8, 1999.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election conducted in Case 14–RC–12080 on October 21 and 22, 1999, be set aside, and that a new election be held at such time and under such circumstances as the Regional Director shall deem appropriate.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees about engaging in protected concerted activity.

WE WILL NOT interfere with employees' protected concerted activity by telling them that a notice regarding another employee's wage rate was inappropriate, harassing, and disruptive.

WE WILL NOT predict that we could lose our parent company's financial support and lose customers if the employees elected the Union to represent you.

WE WILL NOT suspend employees for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Nathan Williams whole for any wage or benefit losses that he suffered by virtue of our unlawful suspension of him on October 8, 1999, because of his protected concerted activity, less any interim earnings, plus interest.

ONYX ENVIRONMENTAL SERVICES, L.L.C., D/B/A TRADEWASTE INCINERATION

Mary J. Tobey, Esq., for the General Counsel.

Mark W. Weisman, Esq., of St. Louis, Missouri, for the Respondent.

Dennis R. Burton, for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in St. Louis, Missouri, on March 8, 2000. The charge was filed by the International Chemical Workers Union Council/UFCW, AFL–CIO, CLC (Union) against Onyx Environmental Services, L.L.C., d/b/a Trade Waste Incineration (Respondent) on October 15, 1999,1 and was amended on December 7, 1999. The complaint was issued on December 10, 1999.

On October 21 and 22, 1999, the Union lost an election conducted among the Respondent's production and maintenance employees at its Sauget, Illinois facility. Timely objections to the conduct affecting the results of the election were filed by the Union on October 26 and were subsequently consolidated for hearing, ruling, and decision with the complaint.

The gravamen of the complaint (and objections) is that the Respondent violated Section 8(a)(3) of the Act by suspending and discharging employee Nathan Williams, a union organizer, for allegedly posting a notice during the organizing campaign about another employee's wage rate. The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating Williams about his involvement in posting the notice, for telling employees that the posted notice was derogatory, disruptive, and causing problems in the workplace, and for implicitly threatening employees with the loss of its parent company's financial support, and loss of customers if employees selected the Union as their representative.2

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are in 1999, unless otherwise indicated.

[2] At trial, the Union withdrew Objection 4. Objection 1 is the only remaining objection. It pertains to the alleged 8(a)(3) violations in the complaint. There are "other acts and conduct" set forth in the Regional Director's Report on Challenges and Objections that pertain to the alleged 8(a)(1) violations in the complaint.

The Respondent's timely answer denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is a specialty hazardous waste incinerator with an office and place of business in Sauget, Illinois. During the 12-month period ending September 30, 1999, the Respondent in conducting such hazardous waste incineration business, performed services valued in excess of $50,000 for customers located outside the State of Illinois. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. The organizing campaign

In August 1999, the Union began organizing the production and maintenance employees at the Respondent's Sauget facility. On September 1, a representation petition was filed, and on September 21, the Regional Director approved a Stipulated Election Agreement to be held on October 21 and 22.

Longtime employee, Nathan Williams, had worked his way up from handling hazardous waste in the material processing department to second in seniority in the tank farm department, where he took daily calculations and off-loaded liquid tankers and roll-off solid debris. Williams also was an active union supporter. He and 11 other employees formed the in-house union organizing committee. On October 1, the in-house committee, en masse, met with the Respondent's general manager, Douglas Harris, in his office to present 12 individual letters identifying each of them as a union supporter working to organize a union to improve their working conditions. Williams presented one such letter for himself. (GC Exh. 4.)

A major campaign issue was the unequal and unfair treatment of the employees. (Tr. 65.) Many employees believed that Douglas Hall, a relatively new employee, was related to General Manager Doug Harris and that as a result Hall had received a higher starting hourly wage and that he was assigned to the loading dock, rather than materials processing department, where most new employees began. (Tr. 21, 60, 64, 144, 195.) The belief that Doug Hall was treated more favorably than other employees was widespread and discussed frequently by the employees throughout the organizing campaign.

2. The Doug Hall notice

Shortly after 7 a.m. on October 8, Supervisor William Mathes saw Williams at the photocopier in the tank farm office. Several minutes later, he noticed Williams leave the breakroom of another department. Mathes testified that he thought that Williams was acting a little unusual so he entered the breakroom where he found a notice posted on the bulletin board, that was not there earlier that morning. The notice read:

> Did you know that Doug Hall make 18.75 hr This show that this company had no regard for the guys who has work to get where they are (GC Exh. 5).

Mathes removed the notice, took it to Williams' supervisor, Kevin Brouk, and told him what he had observed. He also advised General Manager Harris that Brouk was looking into the matter. Copies of the Doug Hall notice also were found on other bulletin boards and all of the mechanics' toolboxes. When Harris learned that the notice had been widely circulated, he called Supervisor Brouk to his office.

Brouk had compared the handwriting on the notice to other documents with Williams' handwriting. He concluded that Williams wrote the notice. Harris asked Human Resources Manager David Sodemann to do a similar comparison using Williams' training records. Sodemann likewise concluded that the handwriting was the same.

Harris instructed Brouk to question Williams about the notice. Specifically, he was told to ask Williams four questions: whether he had seen the notice; whether he had written the notice; whether he had used company equipment to copy the notice; and whether he had posted the notice on company property or bulletin boards. When Williams answered "No" to each question, Brouk told him he was being suspended pending further investigation. Williams asked to speak with Harris, who asked him the same four questions. When Williams again answered "No" to each question, Harris told him that he was suspended pending further investigation.

On October 12, the Respondent's attorney provided handwriting analyst, William H. Storer, with handwriting samples of Williams, as well as a copy of the posted notice for comparison. (R. Exh. 1 (1(c), Tr. 98.) Three days later, he reported that based on his analysis Nathan Williams was the writer of the notice. (R. Exh. 1 (a).) After reviewing the report, Harris concluded that Williams wrote it, copied it, posted it, and lied about his involvement. According to Harris, he conferred with Brouk, Sodemann, and the Respondent's attorney and decided to suspend Williams from October 8–22.

3. Opposition to the Union

On October 14, Harris mailed a letter to all employees and posted copies on the bulletin boards urging them to vote against the Union. (GC Exh. 2.) Among other things, Harris gave four reasons for not joining a union, the fourth and final reason, being:

> [I]t is unlikely that our parent company will view TWI as an appropriate location to invest in long-term capital and our customers may not view TWI as a secure long-term option to handle their business.

Harris closed the letter by urging the employees to vote "NO" on election day.

The next day, October 15, the Respondent held a meeting of employees to show antiunion videos and to answer employee concerns. Gary Brehe, the Respondent's controller attended the meeting, which lasted 3–4 hours. Employee Scott Bushong also attended. Bushong testified that a major employee concern was the unequal and unfair treatment of workers in the way jobs were posted and filled. (Tr. 60.) Employees were upset about how individuals were hired and how they moved into jobs without starting at the entry level.

Accordingly to Bushong's unrebutted testimony, the group spent about 30 minutes discussing Williams' suspension. (Tr. 199.) Bushong asked Brehe what rule had been broken other than posting something unauthorized on a bulletin board, which was done frequently. Brehe responded that the note was inappropriate. The Respondent thought it was done to provoke problems, harass another employee, and it was disruptive. (Tr. 61, 199.) The statement in the note was also untrue. Bushong pointed out that another employee, Tim Marsh, had posted untrue and derogatory things about his supervisor, but went through the chain of progressive discipline before he was terminated. (Tr. 62.) He asked why Williams and Marsh were treated differently. Brehe attempted a response, but backed off the subject by stating that he really did not know the facts in the Tim Marsh case.

4. Assessing a penalty

In the meantime, a meeting with Williams to discuss his suspension was arranged for October 19 in Sodemann's office. When Williams met with Sodemann and Brouk, he was informed that he was suspended without pay for 2 weeks from October 8–22. Brouk also told him that at the end of the suspension he would no longer be working in the tank farm and should report to Sodemann's office for his new assignment. According to Williams, he asked for a copy of his personnel file, but Sodemann told him that he did not have time to make a copy. Williams testified that Sodemann stated that he would provide a copy of the file when Williams reported to work after his suspension. Also, Sodemann asked Williams to sign a disciplinary report, which he refused to do. (GC Exh. 6.) The next day, Williams phoned Sodemann wanting to know about his new assignment, but was told he would find out the details when he reported for work on Monday, October 25.

On October 21 and 22, the election was held. Votes for the Union were 46. Votes against the Union were 56. There were 14 challenged ballots. Williams voted, but his ballot was challenged. (Tr. 31.) Five challenged ballots were sustained after the parties subsequently stipulated and waived their right to a hearing. The conclusive election results showed that the Union lost.

On Monday, October 25, Williams met with Sodemann, and was told that he would report to Bill Mathis in the materials processing group. His hourly wage would be reduced from $18.10 to $14.50 per hour. Williams had worked in materials processing when he began working for the Respondent 11 years earlier. It was a physically demanding job. The workers were required to wear very hot synthetic suits to protect themselves from contact with the hazardous waste. Compared to the tank farm, where Williams worked an 8-hour day, Monday through Friday, he would be required to work alternating 12-hour shifts and every other weekend, performing much more arduous work, and earning less pay.

Williams asked Sodemann for a copy of his personnel file. Sodemann told him that he did not have time to copy the file because he was going out of town at noon, but that he would provide a copy when he returned. When Williams told Sodemann that he had previously promised to have his file available when he came in, Sodemann denied making such a statement. At that point, Williams told Sodemann he had recorded a conversation in which Sodemann promised to have the file ready.[3] Sodemann denied making such a promise, and told Williams that he would have to wait.

According to Sodemann, Williams refused to leave his office. When Sodemann basically ignored him by continuing to work at his desk, Williams took a folder from Sodemann's desk, read it, threw it down, and told Sodemann that he was going to see Harris. (Tr. 173.)

5. The confrontation in Harris' office

There are two versions of what was said and done next. Williams testified that he told Harris that he needed copies of his personnel file and that Sodemann told him that he did not have time to make a copy. Williams further testified that he told Harris that Sodemann said that the file would be ready when he came in that day. Williams stated that Sodemann interjected that he did not have time to make copies and that he denied telling Williams that a copy would be ready for him that day. Williams testified "I then told Doug Harris that Dave Sodemann was lying," and he replied, "if you call Dave Sodemann a liar again, and disrespect him in that way, I am going to have you leave the site." (Tr. 34.) When William repeated that Sodemann was lying, Harris told him that he was suspended until further notice and that he should leave the facility. Williams refused to leave without his personnel file prompting Harris to call the police. The police arrived, asked Williams to leave, and escorted him out of the building. Williams denied using any obscene or threatening language in either Sodemann's or Harris' office. (Tr. 40.)

Sodemann testified that when Williams began telling Harris that he wanted his personnel file, he interrupted to explain to Harris that he already told Williams he would give him the file when he returned. According to Sodemann, Williams replied, "This is bull sh_t!" When he tried to explain to Williams that there was no need to become upset or to use profanity, Williams told him to shut up, became even more agitated, and called him a "f—king liar." (Tr. 175.) Sodemann testified that Harris then cautioned Williams about his language at which point, Williams pointed his finger at Harris and called him a "f—king liar." Harris told Williams he was suspended pending further investigation and ordered him to leave. Williams refused to go, so Harris called the police, who escorted Williams out of the building. (Tr. 175.)

Harris testified that as he was hanging up the phone Williams entered his office demanding his personnel file. (Tr. 111.) He stated that Sodemann explained that he was getting ready to leave town, but would provide the file when he returned. Harris recalled Sodemann mentioning that state law required that the Respondent provide the file within 5–7 days. Harris stated that he told Sodemann to comply with the law. Harris testified that at that point Williams exclaimed in a loud voice, "This is bull sh–t!" Harris told Williams to keep it down and admonished him for using profanity. When William replied that he wanted his file right away, Harris tried to explain that Sodemann did not have time to photocopy the file. Sodemann repeated that he would give Williams the file as soon as he got back. (Tr. 113.) According to Harris, William "got very angry and belligerent, within three to four inches of his face, shaking his fist and finger at Dave, and called him a f—king liar." (Tr. 113, 115.) Harris stated that he became concerned that Williams might hit Sodemann, so he stood up at his desk at which point Williams "turned and stepped towards me, and shook his fist and his finger in my face, and called me a "f—king liar." (Tr. 113.) Harris testified that as Williams calmed down a little bit he was told that his conduct was out of line, that he was suspended for threatening and abusive behavior, and that he had to leave the facility. Williams refused to leave, so Harris called the police. When the police arrived they told Harris that if he did not leave they would arrest him, so he left.

When Sodemann returned a few days later, he and Harris reviewed the incident and a determination was made to terminate Williams for using threatening and profane language.

6. Credibility resolutions

Nathan Williams was not a credible witness. Three times he denied that he wrote, copied, and/or posted the notice on October 8, 1999. He denied it to Brouk, he denied it to Harris, and he also denied it at trial. (Tr. 44.) The credible evidence, however, shows that he authored the notice. The testimony and report of the handwriting analyst, William H. Storer, leaves little doubt that Williams wrote the document . It is also undisputed that Williams was in the area of the photocopy machine and the breakroom as testified by Mathis. Although Williams basically admitted on rebuttal that he was in the copy room and breakroom (Tr. 202), he stated that he was on his way to Dave Matheosian's office to use the telephone and that he went into the breakroom to get condiments for his lunch. His explanations are unpersuasive. In addition, the evidence shows that the subject of the notice (i.e., the perceived favored treatment of Doug Hall) was a major issue in the organizing campaign, which makes it more likely than not, that Williams generated the document to advance the union cause. For these, and demeanor reasons, I do not credit Williams' repeated denials that he did not write, copy, or post the notice.

Williams also unpersuasively testified that he did not use profanity, did not lose his temper, and did not make threatening gestures in Harris' office on October 25, 1999. (Tr. 204, 205.) Rather, he described himself as a "little bit" upset. (Tr. 205.) His description however does not square with the unrebutted evidence showing that Williams refused to leave Sodemann's office without his personnel file; flipped through a file and tossed it on Sodemann's desk; walked into Harris' office unannounced while he spoke on the phone; refused to leave Harris' office when requested to do so; and that it required a police escort to get him to leave. Rather, the evidence describes a person who became increasingly combative and who let his emotions get the better of him.

In addition, the evidence shows that profanity was commonly used by employees in the facility and that Williams admitted using profanity at work. Thus, it is more likely than not that Williams cursed out Sodemann and Harris when they refused to accede to his demand for the immediate release of his personnel file. In contrast, Sodemann's version of what occurred is consistent with and corroborated by Harris' testimony, both of whom I find were more credible witnesses on this point. For these, and demeanor reasons, I do not credit Williams' testimony that he did not use abusive and foul language or make any threatening gestures toward Sodemann or Harris on October 25, 1999.

Finally, for demeanor reasons, I credit Sodemann's testimony denying that he told Williams that he would have a copy of his personnel file ready when he came in on October 25. (Tr. 173.)

B. Analysis and Findings

1. The unlawful October 8 suspension

Section 7 of the Act protects "concerted activities for the purpose of collective bargaining or other mutual aid or protection." No union need be involved and any activity by a single employee may be protected if it seeks to initiate, induce or prepare for group action. *IBP, Inc.,* 330 NLRB 863, 865 (2000), citing *Prill v. NLRB (Meyers Industries),* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The unrebutted credible evidence shows that Williams was a known union supporter and a member of the union organizing committee. A major issue of the organizing drive was the unfair and unequal treatment of employees, including the perceived favored treatment of employee Douglas Hall. The credible evidence reflects that prior to, and during the organizing campaign, the employees frequently discussed Hall's employment status and it was rumored that he was related to General Manager Harris. (Tr. 63–64.) The Respondent was aware that the employees believed Hall was treated more favorably than other employees, most of who started out in the materials processing department. (Tr. 144.) Finally, the evidence shows that the content of the notice was related to a major issue of concern during the organizing campaign. (GC Exh. 5.) Thus, the evidence viewed as a whole supports a

[3] Williams actually never made such a recording, but told Sodemann that he did in order to prompt him to turn over the file.

reasonable inference that as a member of the union organizing committee, Williams created, copied, and distributed a notice pertaining to a major issue of the organizing campaign for the purpose of initiating and inducing group action (i.e., to persuade the employees to support and vote for the Union) against the unfair treatment. Accordingly, I find that by writing, copying, posting, and distributing the notice, Williams was engaged in union and protected concerted activity.

The Respondent argues that Williams' conduct was not protected because the notice contained inaccurate information (i.e., the wage rate was incorrect); the notice was harassing, and Williams lied during the investigation when asked if he was responsible for the notice. The Board has held that an employee's incorrect perceptions of working conditions does not remove protected conduct based on those perceptions from the protections of the Act. *Tyler Business Services,* 256 NLRB 567, 568 (1981). Also, the truth or falsity of a communication is immaterial and is not the test of its protected character. *Professional Porter & Window Cleaning Co.,* 263 NLRB 136, 139 fn. 12 (1982). The evidence does not show that the information in the notice was deliberately or maliciously false. *Senior Citizens Coordinating Council of Riverbay Community,* 330 NLRB 1100, 1105 fn. 17 (2000). Rather, it shows that it was based on the employees' belief that Hall, a relatively new employee, was being paid more than employees with greater years of service. In addition, the evidence supports a reasonable inference that the object of the notice was to underscore the perceived unfair treatment among employees, rather than to harass Hall. Finally, Williams' conduct did not lose the protection of the Act because he lied when questioned about his involvement with the notice. His untruth did not relate to the performance of his job or the Respondent's business, but to a protected right guaranteed by the Act, which he was not obligated to disclose. See *St. Louis Car Co.,* 108 NLRB 1523, 1525–1526 (1954).

Where, as here, the conduct for which the Respondent claims to have disciplined an employee was protected concerted activity, the only issue is whether employees' conduct lost its protection under the Act. *Felix Industries,* 331 NLRB 144, 146 (2000). I find that Williams' conduct did not lose its protection under the Act. That being the case, the inquiry ends. Accordingly, I find the Respondent violated Section 8(a)(1) of the Act by suspending Nathan Williams on October 8, 1999,4 as alleged in paragraph 6A of the amended complaint.5

2. The subsequent suspension and discharge

a. The appropriate legal standard

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.6 Specifically, the General Counsel must establish protected activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage protected activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity. *T & J Trucking Co.,* 316 NLRB 771 (1995).

The credible evidence shows that the Respondent suspended a second time and discharged Williams for using profane language and for acting in a threatening manner at the time he demanded a copy of his personnel file. Because the conduct for which the Respondent claims to have suspended and discharged Williams was not protected concerted activity,7 in and of itself, the issue is whether the October 25 suspension and subsequent discharge was motivated in part by Williams' union activity. Thus, the *Wright Line* analysis is the appropriate analysis for determining whether the second suspension and subsequent discharge violated the Act.

b. The General Counsel's evidence

The undisputed evidence shows that Williams was an open and active union supporter, known to the Respondent. He wore union buttons and stickers at work. He identified himself as an organizing committee member to General Manager Harris on October 1. Ample evidence also exists of antiunion animus. Williams was suspended on October 8 for engaging in union and protected concerted activity. Harris distributed an October 14 letter to all employees opposing the Union and urging employees to vote "No" on election day. Controller Brehe told employees on October 15 that the Respondent thought that Williams' protected concerted conduct was inappropriate and harassing. In addition, the Respondent demoted Williams in connection with his union and protected concerted conduct.8 Finally, the evidence shows that on the heels of the election, the Respondent suspended Williams again and ultimately discharged him. I therefore find that the General Counsel has satisfied her initial evidentiary burden. Thus, the burden shifts to the Respondent to persuasively establish that it would have made the same decision in the absence of protected activity.

c. The Respondent's evidence

The credible evidence shows, and I have found above, that in a loud voice Williams directed abusive and profane language toward Sodemann and Harris in Harris' office, and while doing so, he waived a clenched fist and finger in close proximity of their faces. (Tr. 113, 115, 175.) The evidence also shows that Williams escalated the chain of events leading to his suspension. He refused to leave Sodemann's office and flippantly picked up and perused a file on his desk, thus hoping to annoy Sodemann into providing his personnel file. Realizing that Sodemann could not be moved, he threw the file onto his desk and walked into Harris' office, unannounced, while Harris was on the telephone. After calling Sodemann and Harris "f—king liars," Williams refused to leave Harris' office until the police arrived. Thus, the evidence shows that Williams' conduct was abusive, threatening, and defiant.

In contrast, the evidence shows that Sodemann and Harris repeatedly sought to calm down Williams, explained to him that his personnel file would be made available to him within 7 days, and admonished him in the first instance not to use foul language toward management. There is no evidence that either of them raised their voices to Williams or used words to incite his behavior. Although the evidence shows that Sodemann initially may have provoked Williams' conduct by twice rebuffing his request for a copy of his personnel file, I find that Williams' conduct9 was extreme in comparison to the degree of provocation.10

Although there is no evidence that any other employee had engaged in abusive, threatening, and defiant conduct like that of Williams, the General Counsel broadly argues in her brief at page 10 that the Respondent has not treated other employees in the past in a similar manner.

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[4] The complaint does not allege, nor does the General Counsel argue, that Williams was unlawfully demoted to a materials processing job.

[5] I find it unnecessary to decide whether the suspension also violated Sec. 8(a)(3) of the Act. See *Mast Advertising & Publishing,* 304 NLRB 819, 820 fn. 7 (1991).

[6] *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

[7] The credible evidence shows that Williams went to Harris' office to complain because Sodemann would not immediately provide him with a copy of the file. I find that in doing so, he was not asserting a protected right under Sec. 7 or acting on behalf of others. Rather, his conduct was individual in nature and was not a continuation of his prior protected concerted activity which challenged the perceived unfair treatment of employees by the Respondent.

[8] It is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful. *Meritor Automotive, Inc.,* 328 NLRB 813 (1999).

[9] There is no evidence that Williams was "reacting" to his recent suspension or the fact that he was being demoted. Those topics were never mentioned in discussion with Sodemann and/or Harris. Rather, the evidence reflects that Williams was upset about not receiving his personnel file.

[10] Although Sodemann credibly denied that he promised Williams that he would have the file ready when Williams reported to work after his suspension, he did not deny that Williams asked him for a copy on October 19 or that he told him at that time that he did have time to make a copy. I find that repeatedly putting off Williams was provocative.

Specifically, she asserts that both employees and management at Respondent's facility use obscene language on a daily basis and that the use of such language is not usually cause for discipline. The evidence shows, however, that while the employees may use profanity when referring to supervisors, (Tr. 41) it is not done in their supervisors' presence nor is there any evidence that an employee has addressed a supervisor in a threatening manner. Specifically, Bushong testified that he heard his supervisor call his own supervisor a "f—king prick," but not in the other supervisor's presence. (Tr. 66, 71.) Bushong could not recall any specific examples of using such language toward his supervisor. (Tr. 72.) Although he has heard other employees use profanity in referring to Harris and Sodemann, he admitted that it was not in their presence. (Tr. 74.) Bushong also conceded that he has not heard profanity addressed to a supervisor by an employee in a hostile manner. (Tr. 76.) That no one could recall an employee addressing a supervisor with foul and abusive language and in a threatening manner in a work environment in which profanity is commonplace supports a reasonable inference that it is generally recognized that such conduct is inappropriate and would warrant discipline.

The General Counsel also argues that in contrast to its treatment of Williams, the Respondent tolerated far more misconduct from a former employee, Tim Marsh, before he was discharged. The evidence shows that over a 5-month period Marsh falsely accused his supervisor, Jim Bear, of safety infractions and was openly critical of his work performance. He also disregarded Bear's written instructions regarding clocking in after working overtime on the previous shift. Marsh sought to embarrass and humiliate Bear by posting notes about him on the bulletin board and that Marsh initially denied his involvement. Although Department Manager Marty Elbl eventually recommended that Marsh be terminated, Sodemann instead gave him a written warning. (GC Exh. 3, p. 6.) Marsh finally was terminated after two more incidents of harassing his supervisor.

I find the facts relating to Marsh are not analogous to the facts pertaining to the second suspension and discharge of Williams. There is no evidence that Marsh was abusive, threatening, and/or directly confrontational toward his supervisor, or any higher management official. Rather, the evidence discloses that Marsh's conduct was more subtle and frankly more akin to Williams' distribution of the notice that gave rise to his initial suspension. Indeed, with respect to the Williams' initial suspension (and demotion) for posting and distributing the notice, I find that the evidence discloses that the Respondent held Williams to a higher standard of discipline than Marsh.[11]

However, with respect to Williams' second suspension and ultimate discharge, I find the discipline and discharge of Marsh to be inapposite because, unlike Williams, Marsh's conduct was not abusive or threatening. Rather, I find that under all the circumstances Williams' conduct standing alone was egregious, inappropriate, and defiant and that the Respondent would have terminated him for this conduct, notwithstanding his union and protected concerted activity.

Accordingly, I shall recommend the dismissal of paragraph 6B of the complaint.

3. The unlawful interrogations of Nathan Williams

Paragraphs 5A and 5B of the complaint allege, and the undisputed evidence shows, that on October 8, 1999, Supervisor Kevin Brouk and General Manager Doug Harris separately interrogated Nathan Williams about his union and protected concerted activity (i.e., his involvement in preparing and posting the notice). These were not casual workplace inquiries which took place in the open work area. Rather, Brouk called Williams to his office and attempted to elicit a confession from him in order to determine whether Williams should be disciplined. The same questions for the same purposes were asked by the Respondent's general manager in his office. When Williams denied any involvement he was suspended. The evidence shows that the circumstances surrounding Williams' suspension was discussed by the employees, some of who believed that Williams was treated less favorably than former employee Tim Marsh. Under these circumstances, I find that interrogations were coercive and that they violated Section 8(a)(1) of the Act. *E. B. Malone Corp.,* 273 NLRB 78, 81 (1984).

[11] I find that if a *Wright Line* analysis was applied to the circumstances surrounding the initial suspension from October 8–22, the contrasting treatment of Tim Marsh would support a finding that the Respondent violated Sec. 8(a)(3) by suspending Williams for posting the notice.

4. The unlawful statements by Controller Gary Brehe

Paragraph 5C of the complaint alleges that on October 15, 1999, Controller Gary Brehe interfered with the Section 7 rights of employees who were called by the Respondent to a meeting, where the Respondent expressed its opposition to the union. The undisputed evidence shows that at that meeting there was a 30-minute discussion about Williams' October 8 suspension during which Brehe told the employees that the Respondent thought the notice was done to provoke problems, harass another employee, and it was disruptive. (Tr. 61, 199.) The evidence shows that Bushong responded that another employee, Tim Marsh, had posted untrue and derogatory things about his supervisor on a bulletin board more than once, but that the Respondent went through the chain of progressive discipline before disciplining him.

Contrary to the Respondent's assertions, the evidence does not show that Brehe was merely expressing a view or opinion protected by Section 8(c) of the Act. Rather, he stated the Respondent's official position to a group of employees during an antiunion meeting called by the Respondent. The evidence shows that the employees recognized that the Respondent had treated Williams, who was engaged in union and protected concerted activity, less favorably than Marsh, who only received a written warning for disruptive behavior directed at his supervisor, even though the department manager recommended that he be discharged. I find that Brehe remarks in light of all the surrounding circumstances carried an implied coercive threat of discipline to anyone who engaged in similar union and protected concerted activity. See *Edward's Restaurant,* 305 NLRB 1097, 1098–1099 (1992). Accordingly, I find that Brehe's statement violated Section 8(a)(1) of the Act.

5. The unlawful October 14 letter

The stipulated evidence shows that on October 14, a letter from Doug Harris was mailed to all employees and posted on its bulletin boards which stated that the employees should not join a union because "it is unlikely that our parent company will view TWI as an appropriate location to invest in long-term capital and our customers may not view TWI as a secure long-term option to handle their business." (GC Exh. 2.) The General Counsel argues that the Respondent's statements are coercive threats of loss of financial support and customers, which violate Section 8(a)(1) of the Act. The Respondent argues that the statement is an objective prediction of what its parent corporation and customers would likely do in the event of unionization, which is protected by Section 8(c) of the Act.

It is well settled that an employer's predictions of adverse consequences arising from sources outside its control must have an objective factual basis in order to be permissible under Section 8(a)(1). *Long-Airdox Co.,* 277 NLRB 1157, 1158 (1985). With respect to Harris' assertion that "it is unlikely that our parent company will view TWI as an appropriate location to invest long-term capital," Harris testified that the Respondent's parent corporation, a French company, also owns a dozen or more facilities, including a facility in Port Arthur, Texas. (Tr. 110.) He stated that the French parent corporation was at the time of trial (March 2000) "in the process of investing approximately $10 million in that facility," but had not invested any money in the Sauget facility, which he manages. Harris testified that this concerned him when he wrote the October 14, 1999 letter. (Tr. 111.)

The evidence shows that the French parent corporation, LaVende, did not purchase the Sauget facility until June/July 1999. It therefore had owned the facility for only 3 months at the time the union election was held. (Tr. 81.) There is no evidence that the new owner gave any indication in that 3-month period that it would not invest in Sauget facility if the union was elected. There is no evidence showing why the new parent corporation chose to invest money at the Port Arthur facility 4 months after the election as opposed to the Sauget facility. Nor is there any evidence that Harris knew in October 1999 that the new parent corporation was going to make a future investment in the other facility. Harris' testimony falls short of establishing that his prediction was based on objective facts known to him on or about October 14, 1999. Thus, I find that the prediction that "it is unlikely that our parent company will view TWI as an appropriate location to invest long-term capital" was unfounded and was not objective in nature.

Regarding the assertion that "our customers may not view TWI as a secure long-term option to handle their business," Harris testified that many of the Respondent's customers audit the facility to ensure that their waste products are being disposed of properly. (Tr. 107.) He explained that the audit process is very expensive and therefore customers prefer to do business

with a single source provider to avoid multiple costly audits. Harris testified that "ninety percent of the companies, ninety percent plus of the companies, that audit us, will not allow a sole source provider to be a Union facility, for fear there may be work stoppages." (Tr. 107.) Harris testified that at the time he wrote the October 14 letter, he was concerned that the facility would lose business as a sole source provider because the customers that audited the facility during this period told him that they were concerned about the facility being unionized.12 (Tr. 108, 110.) Specifically, Harris was asked:

> Q. Did you converse with customers, okay, about, okay, their concerns, if you were a Union facility:
>
> A. There was verbal conversation with customers and also written documents from customers about this issue, yes.
>
> Q. Okay. And did you take that into account when you wrote General Counsel's Exhibit No. 2?
>
> A. Yes, I did.
>
> MR. WEISMAN: That concludes my offer of proof.
>
> [Tr. 110.]

Harris did not identify who were the customers and did not explain what each customer specifically told him about its willingness to continue doing business with Respondent if it became unionized. Significantly, Harris did not testify that any customer told him that they would no longer do business with the Respondent if the Union was elected. Further, none of the written documents from customers that Harris purportedly received were proffered to corroborate his testimony or to clarify the unspecified "concerns" of the customers. Nor was any documentary evidence proffered reflecting that any customer had a policy which precluded it from using a unionized sole source provider. I draw an adverse inference from the absence of this documentary evidence, which Harris testified was in the Respondent's possession, that had it been proffered it would not have supported his testimony. In light of the generalized testimony of Harris about what the customers told him, along with the absence of any corroborative documentary evidence which he purportedly received, I find that evidence does not show an objective factual basis for the prediction that the Respondent might lose customers if the union was elected.

Accordingly, I find that both predictions, individually and collectively, were not based on objective facts and therefore the Respondent violated Section 8(a)(1) of the Act.

6. Objections

In the election conducted on October 21 and 22, 1999, there were 56 votes cast against union representation, 46 votes cast for the Union. The Union filed timely objections to the conduct of the election on October 26, 1999.

I have found that the Respondent has violated Section 8(a)(3) of the Act by suspending Nathan Williams from October 8–22, 1999, for engaging in union and protected concerted activity (Objection 1). I have also found that the Respondent has violated Section 8(a)(1) of the Act in the following manner: by coercively interrogating employees about their union and protected concerted activity; by interfering with employees' union and protected concerted activity by telling employees that a note regarding another employee's wage rate was inappropriate, harassing, and disruptive; and by predicting that the Respondent would lose its parent company's financial support and loss of customers if the employees elected the Union to represent them. The Board has long held that "conduct violative of Section 8(a)(1) is, a fortiori, conduct that interferes with the exercise of a free and untrammeled choice in an election." *Dal-Tex Optical,* 137 NLRB 1782, 1786–1787 (1962). I therefore find that this conduct warrants the election be set aside and a new election be conducted.

Accordingly, I shall recommend an order requiring that the results of the election conducted on October 21 and 22, 1999, in Case 14–RC–12080 be set aside and a rerun election be conducted.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Coercively interrogating employees about their union and protected concerted activity.

(b) Interfering with employees' union and protected concerted activity by telling them that a notice regarding another employee's wage rate was inappropriate, harassing, and disruptive.

(c) Predicting that it would lose its parent company's financial support and loss of customers if the employees elected the Union to represent them.

4. The Respondent violated Section 8(a)(3) of the Act by suspending employee Nathan Williams from October 8–22, 1999, for engaging in union and protected concerted activity.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The conduct described in paragraphs 3(a)–(c) and 4 above, also constitute objectionable conduct affecting the results of the representation election held in Case 14–RC–12080 on October 21 and 22, 1999.

7. The Respondent has not engaged in any unfair labor practice not specifically found herein.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully suspended former employee, Nathan Williams, from October 8–22, 1999, it must make him whole for any loss of earnings and other benefits during this period, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, having found that the Respondent engaged in objectionable conduct affecting the results of the election in Case 14–RC–12080, I shall recommend that the election held in that case on October 21 and 22, 1999, be set aside, that a new election be held at a time to be established in the discretion of the Regional Director, and that the Regional Director include in the notice of election the following *Lufkin Rule*13 language:

NOTICE TO ALL VOTERS

> The election conducted on October 21 and 22, 1999, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

[Recommended Order omitted from this publication.]

[12] At trial, I sustained the General Counsel's hearsay objection to the admission of the contents of statements made by single-source customers to Harris regarding their concerns about the facility being union organized. (Tr. 108–110.) The Respondent's counsel nevertheless was allowed to make an offer of proof by asking questions of the witness, Harris. At trial and in his posthearing brief at p. 24, fn. 6, the Respondent's counsel argued that the statements were not being introduced for the truth of the matter asserted, but rather to show Harris' "state of mind" and therefore the statements are not hearsay. Upon further review, I reconsider my decision and admit the proffered evidence.

[13] *Lufkin Rule Co.*, 147 NLRB 341 (1964).